IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S SEPTEMBER 4, 2009 MINUTE ORDER (DKT. NO. 2623)

Defendants respectfully oppose Plaintiff's motion ("Motion") to reconsider the Court's decision granting in part Defendants' *Joint Motion in Limine to Preclude Plaintiffs from Attributing to Poultry Defendants Any Evidence Related to the Use of Poultry Litter by Cattle, Farmers and Other Independent Third Parties*, Dkt. No. 2407. The Court was correct in ruling that Restatement (2d) of Torts § 427B does not allow Defendants to be potentially liable for the actions of the thousands of persons who have no contractual relationship with Defendants, but who buy, sell and use poultry litter on the open market for use as a fertilizer. *See* Ex. A, Sept. 4, 2009 Hr'g Transcript at 239-244:10. By its plain language Section 427B suggests a theory of potential vicarious liability for the actions of independent contractors. *See* Restatement (2d) of Torts, § 427B ("One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve . . . the creation of a public or private nuisance, is subject to liability for harm resulting to other from such a nuisance."). The State provides no authority for its argument that Section 427B is an unbounded theory of strict product

liability that makes a defendant potentially responsible for the use of a product by anyone, anywhere, at any time.

Additionally, Defendants committed to provide the Court with a brief analyzing whether Section 427B's discussion of common-law principles has any bearing on the State's statutory claims brought under 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1. *See* Ex. A at 139:8-24; 242:6 – 243:13. This brief sets out the points and authorities relevant to that issue. In sum, the law is clear that these statutory provisions do not extend vicarious liability any further than Section 427B, and therefore the State cannot base its state statutory claims on the conduct of third parties who have no relationship with the Defendants. As the Court noted at oral argument, the words of Section 427B have meaning, and the State cannot ignore that plain meaning in attempting to stretch the concept of vicarious liability beyond its recognized bounds. *See* Ex. A at 244:5-10 ("THE COURT: [W]hether it's a sale or to give away to a third person, if the person is not an independent contractor, then 427B doesn't apply. 427B is constrained by its language. Words have meaning. So that will be the Court's ruling.").

ARGUMENT

I. The State's Routine Motions for Reconsideration are Contrary to the Federal Rules and Waste the Resources of the Parties and the Court

The parties agreed to submit briefs to the Court on whether Oklahoma state statutes extend vicarious liability beyond the common law independent contractor context discussed in Section 427B. Ex. A at 139:8-24; 242:6 – 243:13. However, the State's Motion does nothing more than seek reconsideration of the Court's ruling that Section 427B does not apply outside of the independent contractor context (and thus Defendants may not be held liable under the State's common-law claims for the actions of individuals with whom the Defendants have no contractual relationship). *See* Motion at 1-6.

Defendants respectfully submit that the State cannot continue to go backwards in this case. It has been the State's practice to seek reconsideration of every decision rendered by this Court that is adverse to the State's arguments, no matter how well founded a particular decision may be. By Defendants' count, the State has filed at least seven formal motions for reconsideration. *See, e.g.*, *Motion to Reconsider the Court's February 26, 2007 Opinion and Order*, Dkt. No. 1074 (Mar. 8, 2007); *Motion for Reconsideration of Order Compelling Discovery*, Dkt. No. 1153 (May 29, 2007); *Motion to Reconsider Amended Scheduling Order*, Dkt. No. 1386 (Dec. 3, 2007); *Motion to Reconsider the Court's Opinion and Order*, Dkt. No. 1486 (Jan. 28, 2008); *State of Oklahoma's Motion for Reconsideration of the Court's July 22, 2009 Opinion and Order*, Dkt. No. 2392 (Aug. 3, 2009); *Motion for Reconsideration of the Court's July 24, 2009 Opinion and Order*, Dkt. No. 2443 (Aug. 7, 2009). These motions are inappropriate under the Federal Rules as they waste the resources of the parties and the Court revisiting issues that have already been decided. Judicial decisions "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quake AlloyCasting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988). "Courts uniformly agree that a Rule 59(e) motion to reconsider is designed to permit relief in extraordinary circumstances and not to offer a second bite at the proverbial apple." *Maul v. Logan County Bd. of County Comm'r*, 2006 U.S. Dist. LEXIS 86934, *2 (W.D. Okla. Nov. 29, 2006); *see Lumpkin v. United Recovery Sys., L.P.*, 2009 U.S. Dist. LEXIS 60752, *4-5 (N.D. Okla. July 16, 2009) (Frizzell, J.) (same). Accordingly, reconsideration is only justified in the event of "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). *Id*. Under this standard, "[p]arties' efforts to revisit issues already addressed or advance arguments that could have been raised in prior briefing will not be considered." *Lumpkin*, 2009

U.S. Dist. LEXIS 60752 at *5 (internal quotations omitted); *see also Maul*, 2006 U.S. Dist. LEXIS 86934 at *3.

The State's Motion does not meet this high threshold. The Motion neither raises an intervening change in the controlling law nor identifies previously unavailable evidence. Rather, the Motion repeats the same arguments that were briefed and extensively discussed at oral argument. The Motion argues (1) that Section 427B applies outside of the context where a principal hires an independent contractor; and (2) even if Section 427B is limited to the independent contractor context, Defendants should still be held liable for the actions of third parties with whom they have no relationship because a large amount of poultry litter is created in the IRW and Defendants allegedly could foresee that hay growers, cattlemen, and others might use poultry litter in a manner that creates a nuisance. Motion at 1-6.

These are the very arguments the State pressed in its briefs and at oral argument. *See* Ex. A. at 203:10-13 – 205:17 ("THE COURT: Of course [the State's] argument is it's foreseeable either way, and that foreseeability in the context of 427B applies either to the contract spreader or to the spreader who buys the poultry litter from the grower."); 220:11–221:1 ("MR. BAKER: [H]ere's the situation. They have generated massive amounts of poultry waste, they know it has to be disposed of and by entering into that contract where they know it's going to be land applied in a manner that's gong to cause a nuisance, that's foreseeable, that's where 427B comes in. THE COURT: Well, but 427B is bounded by the language thereof. It says – it's not just a rule of foreseeability. It says, 'one who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve a trespass,' *et cetera*. So although your foreseeability argument obviously, by witness of the fact that I'm trying to wrestle with it, has some real weight, 427B is not an unlimited foreseeability argument, but one bounded by the language 'one who employs an independent contractor.").

The State simply disagrees with the Court's analysis. This does not provide a valid basis for reconsideration.

II. The Court's Ruling Faithfully Applies the Plain Text of Section 427B

The State accuses the Court of having "misapprehended the facts, a party's position, and the controlling law." Motion at 1. Contrary to this assertion, the Court discussed all of the parties' positions at length and even took a recess to review the State's best authority before rendering a decision. *See* Ex. A at 205:18-19; 214:4 – 216:15. The Court's decision should stand.

The general common law rule that is followed in both Oklahoma and Arkansas is that a principal is not liable for the actions of an independent contractor. *See*, *e.g.*, *Tankersley v. Webster*, 243 P. 745 (Okla. 1925); *Stoltze v. Ark. Valley Elec. Co-op Corp.*, 127 S.W.3d 466 (Ark. 2003). In order to escape this traditional limitation, the State invokes Section 427 B. This effort should be rejected as an initial matter because Section 427B has no place in either Oklahoma or Arkansas law. Neither the Oklahoma Supreme Court, nor the Oklahoma Court of Civil Appeals, nor the Arkansas Supreme Court, nor the Arkansas Court of Appeals has adopted Section 427B as controlling legal authority for any purpose, much less under circumstances similar to those in this lawsuit. The State's principal Oklahoma authority on the issue of assigning an independent contractor's tort liability to an employer is *Tankersley*, 243 P. 745, but that case strongly suggests that Section 427B is not compatible with Oklahoma law. The plaintiff in *Tankersley* was injured after picking up and playing with a blasting cap left at a construction site. The plaintiff sued the general contractor, who defended arguing that responsibility lay with the independent subcontractor who had used the blasting caps in excavating the foundations for the new school building. *See id.* at 746-47. The court recognized and applied the general rule that a principal is not responsible for the conduct of the independent

contractor. *See id.* at 747-48. The court noted a possible exception where "the performance of a specific job by an independent contractor in the ordinary mode of doing the work necessarily or naturally results in causing an injury." *Id.* at 747. Had the plaintiff demonstrated, the court observed, that the excavation necessarily required the blasting, and had such required blasting caused the injury, then the outcome might have been different. *See id.* at 747-48. Thus, the *Tankersley* court did not invoke the rule proposed in Restatement § 427B, but rather applied the "inherently dangerous activity" rule reflected in Restatement sections 427 and 427A—which apply activities that "necessarily or naturally result[] in causing an injury." *Tankersley*, 243 P. at 747.[1] Section 427B proposes a much looser standard of vicarious liability pertaining to conduct merely "likely to" cause a trespass. *Tankersley* lends no support to the State's invitation to read Section 427B into Oklahoma law.

The State similarly offers no basis for incorporating Section 427B into Arkansas law. Defendants have found no Arkansas case that discusses or applies Section 427B. As in Oklahoma, it is unlikely that Arkansas has or would adopt Section 427B's loose vicarious liability standard. Only just recently, in *Stoltze*, 127 S.W.3d 466, the Arkansas Supreme Court held that Arkansas has recognized three exceptions to the general rule that an principal is not responsible for the negligence of an independent contractor: (1) where the principal is negligent in hiring the contractor; (2) where the principal negligently fails to perform certain duties the

[1] Section 427 provides that a principal who "employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger." Section 427A provides a similar rule, that a principal who "employs an independent contractor to do work which the employer knows or has reason to know to involve an abnormally dangerous activity, is subject to liability to the same extent as the contractor for physical harm to others caused by the activity." Restatement (Second) of Torts §§ 427 & 427A.

principal has undertaken or performs them in a negligent manner; and (3) where the principal delegates to an independent contractor work that is inherently dangerous. *See id.* at 470. None of these exceptions apply to the facts of the case at bar.

Even if Section 427B did apply under Oklahoma or Arkansas law, it still falls well short of the unbounded meaning the State ascribes to it. Any analysis of the meaning of Section 427B must begin with its text. Although this plain-meaning principle is most commonly associated with the interpretation of statutes,[2] it applies with equal force to the text of the Restatements. *See AICC of Puerto Rico v. Lampe GmbH*, 397 Fed. Appx. 645, 649 n. 3 (3d Cir., Jan 12, 2009); *Kennedy v. Children's Serv. Society of Wisconsin*, 17 F.3d 980, 984-85 (7th Cir. 1994) (rejecting proposed interpretation of a term as being outside of Restatement (2d) of Torts § 573's plain meaning); *Cyr v. B. Offen & Co., Inc.*, 501 F.2d 1145, 1155 (1st Cir. 1974) (characterizing argument for strict liability as "frivolous as the plain language of sec. 402A Restatement of Torts 2d, creates liability only to the ultimate user or consumer"); *Bank of New Orleans & Trust Co. v. Monco Agency, Inc.*, 719 F. Supp. 1328, 1331 (E.D. La. 1989) (rejecting argument as contrary to case law "and the plain language of the Restatement.").

Section 427B provides:

> *One who employs an independent contractor to do work* which the employer knows or has reason to know to be likely to involve a trespass upon the land of another or the creation of a public or a private nuisance, is subject to liability for harm resulting to others from such trespass or nuisance.

Rest. (2d) Torts § 427B (emphasis added). As a matter of plain English, this provision is limited to the independent contractor context, and the particular work that a party has employed an

[2] *See, e.g., Consumer Prod. Safety Comm'n v. Gte Sylvania*, 447 U.S. 102, 109 (1980); *Goetz v. United States Dep't of Agric.*, 12 Fed. Appx. 718, 727 (10th Cir. 2001); *Long v. Bd. of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1157 (10th Cir. 1997); *Nevada Power Co. v. Watt*, 711 F.2d 913, 920 (10th Cir. 1983); *Blue Cross Asso. v. Harris*, 664 F.2d 806, 809 (10th Cir. 1981); *Glover Constr. Co. v. Andrus*, 591 F.2d 554, 559 (10th Cir. 1979).

independent contractor to perform. That plain meaning is conclusive of the State's argument. *AICC*, 397 Fed, Appx. at 649 n. 3; *Kennedy*, 17 F.3d at 984-85; *Cyr*, 501 F.2d at 1155; *Bank of New Orleans*, 719 F. Supp. at 1331.

In its previous briefs and oral arguments, the State asserted that Section 427B applies to third parties' decisions as to when, where, and how to apply poultry litter to their lands. The State argued that the touchstone of Section 427B is foreseeability—that Defendants are liable for any nuisance or trespass caused by any person's use of poultry litter so long as it is foreseeable that someone might misuse poultry litter in that manner. *See* Ex. A. at 219:8 – 233:1. The State repeats that argument in its Motion. *See* Motion at 2, 4-6. However, by emphasizing that Section 427B relates to "work" that has a foreseeable negative result, the State ignores the fact that the "work" that is subject to Section 427B is the work of the independent contractor. *See* Ex. A at 240:3-10 ("THE COURT: And I do think that the defendants are correct with regard to the application of 427B. I think the language of 427B is restricted or restricts the concept of foreseeability to a situation where one employees an independent contractor and doesn't go beyond that, although I very much appreciate plaintiffs' counsels, Mr. Baker's and Mr. Bullock's arguments regarding general foreseeability. I just don't think 427B is the tool to get you that far.").

The official comments to Section 427B confirm this plain-text meaning. Comment (b) provides that the Restatement's exception:

> applies in particular *where the contractor is directed or authorized by the employer* to commit such a trespass, or to create such a nuisance, and where the trespass or nuisance is a necessary result of doing the work, as where the construction of a dam will necessarily flood other land.…

Id. (emphasis added).[3] The Restatement also provides illustrations of the Rule's application, each of which makes clear that Section 427B's exception only applies to situations where an independent contractor creates a nuisance or trespass:

> 1. *A employs B, an independent contractor*, to construct a dam in a stream on A's land. A knows or has reason to know that the work on the dam makes it likely that in the event of heavy rainfall land upstream will be flooded. Before the dam is completed a spring freshet occurs, which floods such land of C. A is subject to liability to C.
>
> 2. *A employs B, an independent contractor*, to excavate on A's land. The contract calls for blasting. A knows or has reason to know that it is likely that concussion from the blasting will damage C's adjoining house, and that dust from the blasting will create a traffic hazard on the public highway. The concussion loosens plaster in C's ceiling, which falls on C's head and injures him. The dust cloud on the highway causes a collision between automobiles driven by D and E. A is subject to liability to C, D, and E.

Id. (emphasis added). The State identifies nothing in the Restatement or in its supporting materials that justifies further extending Section 427B to the situation the State presents.

In light of this plain text, there is no good faith argument that Section 427B applies to work that is performed by someone other than an independent contractor. Indeed, because of this plain meaning, counsel for the State conceded at oral argument that Section 427B cannot be applied in a situation where the work in question was not performed by an independent contractor. *See* Ex. A 226:11-14 ("MR. BULLOCK: Well, first of all, of course, if we don't have a subcontractor then 427B doesn't apply. Okay. I mean by its terms. I can't win that argument that 427B applies, gives you liability where there's no subcontractor.")

The State's next argument is that the "work" the Contract Growers perform in this case is to transfer poultry litter to other third parties, and that liability therefore follows the poultry

[3] *See* Ex. A at 223:4-7 ("THE COURT: I understand the general argument of foreseeability, but the comment b talks about a contractor and an employer. In a case where someone sells the product there is no contractor and there is no employer.").

litter to make Defendants liable for the decisions of those third parties about how, when, and where to apply the litter they purchased. *See* Motion at 5. The Court already considered and rejected this argument as well. *See* State's Response to Defendants' Motion in Limine, Dkt. No. 2498 at 4; [4] Ex. A at 215:12–215:15; 219:4–220:5[5]; 233:9-244:10. As the Court recognized, this is a theory of strict product liability, which the State did not plead in this case. *Id.* Under this theory, the liability follows the product regardless of whether the ultimate person is in contractual privity with a Defendant. Of course, it is the work (and decisions) of this ultimate person that determines whether poultry litter is used in a manner that allegedly causes a nuisance or trespass.

The State's Motion cites no case that supports the State's aggressive attempt to extend the

---

[4] The State's previous brief argued "[t]hat certain contract growers might from time to time transfer the poultry waste generated by Defendants' birds to a third party for land application in no way changes the analysis.… The complained-of nuisance (including federal common law nuisance) and trespass in this case are likely to result from growing poultry irrespective of who land-applies the poultry waste.… The same analysis pertains to instances where Defendants have transferred poultry waste from their own poultry operations to third persons."

[5] "THE COURT: Well his point wasn't so much as to the percentage but that some amount that is sold. I mean his point is the dividing line is that which is purchased or bartered is no longer within the ambit of 427B.

MR. BAKER: And I understand that point. And that's going to be a very important point in a few minutes in my argument because it shows that they know that poultry waste is being transferred to third persons to handle the disposition of it, the integrators know that. And that gets into my next point which is the key is foreseeability. We have to come back to foreseeability. Reason to know that something that's going to happen from the work. What is foreseeable by the integrators from the contract work with the growers is A, that massive amounts of poultry waste are going to be generated, the waste has to be gotten rid of, the waste is land applied in a concentrated area, and that land applied poultry waste will result in a nuisance or trespass. You can't manipulate the operation of 427B by simply having, adding intermediaries. The focus is always going to come back to foreseeability.

THE COURT: Well, but his argument as I understand it, their argument, the defendants, is that 427B although it – I think you're right, it turns on foreseeability, it has limits. It's not a theory of strict liability where foreseeability extends out as far as that unreasonably dangerous or inherently dangerous product may go in the marketplace, but only so far as one employs an independent contractor and that once that product is sold then 427B doesn't apply."

doctrine of vicarious liability to thousands of unknown farmers, ranchers, and commercial and private landowners who purchase and use a lawful product. As the Court will recall, in its brief the State relied on *McQuilken v. A & R Development Corp.*, 576 F. Supp. 1023, 1033 (E.D. Pa. 1983), which states that "[a]n employer or contractor is held liable for 'farming out' work which he knows, or has reason to know, will create a nuisance.'" *Id.* But, as the Court noted, *McQuilken* only involved a situation where a principal hired independent contractors to do work; it did not extend liability subcontractors, let alone to individuals without any contractual or other relationship with the principal. Thus, *McQuilken* does not support the State's argument. *See id.*; Ex. A at 214:4 – 215:13 ("THE COURT: But not even the facts, as I read it and maybe I'm reading it incorrectly and either one of you can correct me, but as I read it this doesn't go as far as the plaintiffs want to go.").

III. The State's Statutory Claims Do Not Impose Potential Vicarious Liability For the Acts of Independent Third Parties

At this point in the case, the State asserts two statutory claims. Neither imposes liability on Defendants for the actions of independent third parties.

A. 27A Okla. Stat. § 2-6-105

27A Okla. Stat. § 2-6-105(A) provides that "[i]t shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state." Accordingly, to establish liability for a violation of 27A Okla. Stat. § 2-6-105(A), Plaintiff bears the burden to prove either that (1) Defendants "cause[d] pollution of any waters of the state;" or (2) Defendants "place[d] or cause[d] to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state." 27A Okla. Stat. § 2-6-105(A).

In applying these provisions in this case, it is critical to determine whose actions may be imputed to the Defendants for purposes of establishing liability. In other words, the question is whether Defendants can be held liable for the actions of: (1) independent contractors such as the Contract Growers who raise poultry under contract with Defendants; or (2) third parties who have no contractual relationship with the Defendants, but who buy and use poultry litter on the open market. Once this question is answered, the Court and the parties may address whether the actions of the individuals for whom Defendants may be held liable "cause[d] pollution of any waters of the state," or "place[d] or cause[d] to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state." 27A Okla. Stat. § 2-6-105(A).

The State has repeatedly asserted that the common-law principles governing the extent of corporate liability should apply in establishing whether Defendants are liable under these statutes. *See, e.g.*, Ex. A at 187:20 – 189:4; 191:1-7 (arguing that § 427B and common-law nuisance principles on the scope of a principal's liability apply to each type of claim that can be brought under § 2-6-105). Upon close examination of the law, Defendants agree that the general rule is that a statute should be read in harmony with preexisting common law principles and displaces those principles only to the extent required by the statute's terms. *See, e.g.*, *Toma v. Toma*, 163 P.3d 540, 545 (Okla. 2007) (noting that the "common law may not be abrogated by implication; instead, its alteration must be explicitly expressed"); *McCathern v. City of Oklahoma* City, 95 P.3d 1090, 1097 (Okla. 2004) ("An ambiguous legislative text is insufficient as a basis for the common law's abrogation") (footnote omitted); *Rogers v. Meiser*, 68 F.3d 967, 973 (Okla. 2003) ("Implied abrogation of a common law right will only be found where a statute is enacted and undertakes to cover the entire subject treated and is clearly/ unmistakably designed as a substitute for the common law or where the common law and statutory law are so repugnant that both in reason may not stand or coexist."). Consistent with this principle, the

Oklahoma Supreme Court has recognized that pre-existing common law doctrines survive the passage of statutes on the same subject matter unless a contrary legislative intent is apparent. *See, e.g.*, *McCathern*, 95 P.3d at 1097; *Wright v. Grove Sun Newspaper Co., Inc.*, 873 P.2d 983, 987 (Okla. 1994) (statutory defense for newspapers from libel actions did not abrogate the broader "fair report privilege" that already existed at common law); *Raney v. Diehl*, 482 P.2d 585, 589-90 (Okla. 1971) (statute's use of the undefined term "survivorship" required a presumption that the legislature intended to adopt the common law rule of joint tenancy, which included survivorship, since there was not language indicating a contrary intent).

In keeping with these rules, common law principles on a subject inform the interpretation of statutes involving that subject. "It is [] well established that '[w]here [a legislature] uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that [the legislature] means to incorporate the established meaning of these terms.'" *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)); *Roth v. American Hosp. Supply Corp.*, 965 F.2d 862, 866 (10th Cir. 1992) (same); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) (choosing to "adopt a common-law test for determining who qualifies as an 'employee' under ERISA"). The Oklahoma Legislature has explicitly indicated that it intends for this principle to apply to Oklahoma's statutory enactments, stating that "[t]he common law, as modified by constitutional and statutory law… shall remain in force in aid of the general statutes of Oklahoma." 12 Okla. Stat. § 2; *see also Raney*, 482 P.2d at 589-90 (common-law principles apply to a statute's terms absent an expressing of contrary legislative intent).

Section 2-6-105 does not indicate a legislative intent to abrogate the common-law rules on which persons may create liability for a corporation. Accordingly, Section 2-6-105 should be interpreted consistent with the common-law principles discussed previously. Under those

common-law rules, Defendants may be held liable for the actions of their employees, but not for the actions of independent contractors. *See, e.g.*, *Tankersley*, 243 P. at 747-748. As with its common-law claims, the State seeks to invoke two exceptions to this general rule: (1) an exception that allows a court to treat an independent contractor as an employee of the corporation when the principal exercises control over the specific activity that creates the nuisance; and (2) Restatement (2d) of Torts § 427B. But, as discussed above, neither of these exceptions can reach the conduct of third parties who have no contractual relationship with Defendants. *See supra* § II. Therefore, the issues to be resolved at trial are whether Defendants themselves have violated the terms of Section 27A-6-105 (through the actions of their employees), and whether Defendants can be held liable for the actions of the Contract Growers who raise poultry under contract with Defendants. The rules of vicarious liability do not render Defendants potentially liable for the actions of third parties with whom they have no relationship.

Even if the evidence at trial establishes that Defendants can be liable for the conduct of Contract Growers, the State must still establish that the persons for whom Defendants are legally responsible committed a violation of Section 27A-6-105. For brevity, this brief does not discuss the elements of that violation other than to note the plain text of Section 27A-6-105 requires that the person charged with a violation (1) "cause pollution of any waters of the state;" or (2) "place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state." 27A Okla. Stat. § 2-6-105(A). In terms of "caus[ing]" poultry litter to be "place[ed], the word "place" has a plain-text meaning of putting something into a particular location. *See Webster's Third New International Dictionary of the English Language* (Unabridged), at 1727 (1993) (defining "place" as "to put into or as if into a particular position; cause to rest or lie"); *Shorter Oxford English Dictionary* (5th ed.) at 2225 (2003) (providing the

definition to "set or position in a particular place or spot; put or bring into a particular state or situation").

B. 2 Okla. Stat. § 2-18.1

2 Okla. Stat. § 2-18.1(A) provides that "[i]t shall be unlawful and a violation of the Oklahoma Agricultural Code for any person to cause pollution of any waters of the state by persons which are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act." The same principles discussed above obtain with regard to Section 2-18.1. Again, nothing in this Section betrays any legislative intent to abrogate the traditional principles of Oklahoma common law governing vicarious liability of principles for the actions of contractors, sub-contractors, and others. Accordingly, Defendants may be held liable under this section only for the actions of employees, and not for the actions of independent contractors absent a recognized exception to that rule. Again, the State seeks to use 427B to abrogate the rule against vicarious liability for the actions of independent contractors. But, even if Oklahoma had adopted Section 427B into its common law, that section would extend the scope of Defendants' potential liability only to the acts of the Contract Growers. The State has cited nothing to support the proposition that Section 427B converts these statutory claims into unbounded claims of product liability. Therefore, for all the same reasons set out above, the State's claims with regard to Section 2-18.1 should also be rejected.

CONCLUSION

For the foregoing reasons, the State's motion for reconsideration should be denied.

Respectfully submitted,

BY: ____*/s/ Jay T. Jorgensen*_____

Thomas C. Green
Mark D. Hopson
Jay T. Jorgensen
Gordon D. Todd
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

-and-

Robert W. George
Vice President & Associate General Counsel
Tyson Foods, Inc.
Bryan Burns
Timothy T. Jones
2210 West Oaklawn Drive
Springdale, Ark. 72764
Telephone: (479) 290-4076
Facsimile: (479) 290-7967

-and-

Michael R. Bond
KUTAK ROCK LLP
Suite 400
234 East Millsap Road
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

-and-

Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
RYAN, WHALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766

ATTORNEYS FOR TYSON FOODS, INC.; TYSON POULTRY, INC.; TYSON CHICKEN, INC; AND COBB-VANTRESS,

INC.

BY:____/s/*James M. Graves*_____

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

Woodson W. Bassett III
Gary V. Weeks
James M. Graves
K.C. Dupps Tucker
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
Telephone: (479) 521-9996
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753
George W. Owens
OWENS LAW FIRM, P.C.
234 W. 13th Street
Tulsa, OK 74119
Telephone: (918) 587-0021
Facsimile: (918) 587-6111

ATTORNEYS FOR GEORGE'S, INC. AND GEORGE'S FARMS, INC.

BY:____*/s/ A. Scott McDaniel*_____

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

A. Scott McDaniel, OBA #16460
Nicole M. Longwell, OBA #18771
Philip D. Hixon, OBA #19121
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC
320 South Boston Ave., Ste. 700
Tulsa, OK 74103
Telephone: (918) 382-9200
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201

Telephone: (501) 688-8800
Facsimile: (501) 688-8807

ATTORNEYS FOR PETERSON FARMS, INC.

BY: */s/ John R. Elrod*

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

John R. Elrod
Vicki Bronson, OBA #20574
P. Joshua Wisley
CONNER & WINTERS, L.L.P.
211 East Dickson Street
Fayetteville, AR 72701
Telephone: (479) 582-5711
Facsimile: (479) 587-1426

-and-

Bruce W. Freeman
D. Richard Funk
CONNER & WINTERS, L.L.P.
4000 One Williams Center
Tulsa, OK 74172
Telephone: (918) 586-5711
Facsimile: (918) 586-8553

ATTORNEYS FOR SIMMONS FOODS, INC.

BY: */s/ Robert P. Redemann*

(SIGNED BY FILING ATTORNEY WITH PERMISSION)
Robert P. Redemann, OBA #7454
PERRINE, MCGIVERN, REDEMANN, REID, BERRY & TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
Telephone: (918) 382-1400
Facsimile: (918) 382-1499

-and-

Robert E. Sanders
Stephen Williams
YOUNG WILLIAMS P.A.
Post Office Box 23059
Jackson, MS 39225-3059
Telephone: (601) 948-6100
Facsimile: (601) 355-6136

ATTORNEYS FOR CAL-MAINE FARMS, INC. AND CAL-MAINE FOODS, INC.

BY: */s/ John H. Tucker*

(SIGNED BY FILING ATTORNEY WITH PERMISSION)
John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
RHODES, HIERONYMUS, JONES, TUCKER & GABLE, PLLC
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: (918) 582-1173
Facsimile: (918) 592-3390

-and-

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 766-7000
Facsimile: (612) 766-1600

ATTORNEYS FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

CERTIFICATE OF SERVICE

I certify that on October 6, 2009, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
Tina L. Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us
Douglas Allen Wilson	doug_wilson@riggsabney.com,
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
David P. Page	dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	
Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	
J. Randall Miller	rmiller@mkblaw.net
Louis W. Bullock	lbullock@bullock-blakemore.com
Michael G. Rousseau	mrousseau@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
Motley Rice LLC	
Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Motley Rice	

COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Gordon D. Todd	gtodd@sidley.com

Erik J. Ives eives@sidley.com
Sidley Austin LLP

Robert W. George robert.george@tyson.com

Michael R. Bond michael.bond@kutakrock.com
Erin Walker Thompson erin.thompson@kutakrock.com
Kutak Rock LLP
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay rtl@kiralaw.com
Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin jgriffin@lathropgage.com
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann rredemann@pmrlaw.net
Lawrence W. Zeringue lzeringue@pmrlaw.net
David C. Senger dsenger@pmrlaw.net
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders rsanders@youngwilliams.com
E. Stephen Williams steve.williams@youngwilliams.com
Young Williams P.A.
COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
The Owens Law Firm, P.C.

James M. Graves jgraves@bassettlawfirm.com
Gary V. Weeks
Paul E. Thompson, Jr. pthompson@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
Jennifer E. Lloyd jlloyd@bassettlawfirm.com
Bassett Law Firm
COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Conner & Winters, P.C.

Bruce W. Freeman bfreeman@cwlaw.com
D. Richard Funk

Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker — jtuckercourts@rhodesokla.com
Leslie J. Southerland — ljsoutherlandcourts@rhodesokla.com
Colin H. Tucker — chtucker@rhodesokla.com
Theresa Noble Hill — thillcourts@rhodesokla.com
Rhodes, Hieronymus, Jones, Tucker & Gable

Terry W. West — terry@thewesetlawfirm.com
The West Law Firm

Delmar R. Ehrich — dehrich@faegre.com
Bruce Jones — bjones@faegre.com
Krisann Kleibacker Lee — kklee@baegre.com
Todd P. Walker — twalker@faegre.com
Faegre & Benson LLP
COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

Michael D. Graves — mgraves@hallestill.com
D. Kenyon Williams, Jr. — kwilliams@hallestill.com
COUNSEL FOR POULTRY GROWERS

William B. Federman — wfederman@aol.com
Jennifer F. Sherrill — jfs@federmanlaw.com
Federman & Sherwood

Charles Moulton — charles.moulton@arkansag.gov
Jim DePriest — jim.depriest@arkansasag.gov
Office of the Attorney General
COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

Carrie Griffith — griffithlawoffice@yahoo.com
COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON

Gary S. Chilton — gchilton@hcdattorneys.com
Holladay, Chilton & Degiusti, PLLC

Victor E. Schwartz — vschwartz@shb.com
Cary Silverman — csilverman@shb.com
Shook, Hardy & Bacon, LLP

Robin S. Conrad — rconrad@uschamber.com
National Chamber Litigation Center, Inc.
COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND THE AMERICAN TORT REFORM ASSOCIATION

Richard C. Ford fordr@crowedunlevy.com
LeAnne Burnett burnettl@crowedunlevy.com
Crowe & Dunlevy
COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.

M. Richard Mullins richard.mullins@mcafeetaft.com
McAfee & Taft

James D. Bradbury jim@bradburycounsel.com
James D. Bradbury, PLLC
COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE FEEDERS ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS ASSOCIATION OF DAIRYMEN

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Dustin McDaniel
Justin Allen
Office of the Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201-2610
COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

John E. and Virginia W. Adair Family Trust
Route 2 Box 1160
Stilwell, OK 74960

Cary Silverman
Shook Hardy & Bacon LLP
600 14th Street NW, Suite 800
Washington, D.C. 20005-2004

Cherrie House
P.O. Box 1097
Stilwell, OK 74960

David Gregory Brown
Lathrop & Gage LC (Jefferson City)
314 E High Street
Jefferson City, MO 65101

Donna S Parker
34996 S 502 Road
Park Hill, OK 74451

Doris Mares
14943 SE 15th Street
Choctaw, OK 73020-7007

G Craig Heffington
20144 W Sixshooter Road
Cookson, OK 74427

George R Stubblefield
HC-66, Box 19-12
Proctor, OK 74457

Gordon W. and Susann Clinton
23605 S Goodnight Lane
Welling, OK 74471

Jerry M Maddux
Selby Connor Maddux Janer
P.O. Box Z
Bartlesville, OK 74005-5025

Jim Bagby
RR 2, Box 1711
Westville, OK 74965

Jonathan D Orent
Motley Rice LLC (Providence)
321 S Main Street
Providence, RI 02940

Marjorie Garman
19031 US HWY 412
Colcord, OK 74338-3861

Randall E Kahnke
Faegre & Benson (Minneapolis)
90 S 7th Street, Suite 2200
Minneapolis, MN 55402-3901

Richard E Parker
34996 S 502 Road
Park Hill, OK 74451

Robin L. Wofford
Route 2, Box 370
Watts, OK 74964

Steven B Randall
58185 County Road 658
Kansas, OK 74347

Victor E Schwartz
Shook Hardy & Bacon LLP
600 14th Street NW, Suite 800
Washington, D.C. 20005-2004

William House
P.O. Box 1097
Stilwell, OK 74960

/s/ *Jay T. Jorgensen*